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E. Arnold Forrest

TREND OF APPLICATION OF THE DOCTRINES OF RES IPSA LOQUITUR AND EXCLUSIVE CONTROL IN PENNSYLVANIA

By

E. ARNOLD FORREST*

Two recent decisions of the Supreme Court of Pennsylvania[1] suggest that an examination and appraisal of the trend of the application of the doctrines of res ipsa loquitur and exclusive control might be worth-while.

In *Loch v. Confair,* 372 Pa. 212 (1953), the facts, as stated by the court were that:

> "Plaintiffs were shopping in the A & P's supermarket in Wilkes-Barre. As the husband was picking up two bottles of ginger ale, one in each hand, from the bottom shelf of the soft drink display, the bottle in his right hand burst and a piece of the glass struck and cut the back of the wife's leg, resulting in a deep laceration and a long permanent scar." (Plaintiff sued both the A & P and the bottling company.)

Recognizing that the doctrines of res ipsa loquitur and exclusive control did not apply, the court, nevertheless, said, page 217.

> *"It would seem, therefore, notwithstanding the limitations on the applicability of the doctrines of res ipsa loquitur and exclusive control previously referred to, that reason and justice alike should entitle plaintiffs to the benefits of those methods of establishing a prima facie case.* Plaintiffs having testified to the manner in which the accident occurred, the burden should then rest upon the defendant A & P Co. to show that after the bottle came into its possession it was not subjected to any mishandling or to any unusual atmospheric or temperature changes. The duty would then devolve upon the Beverage Co. to establish that it conducted its operations with due care and according to the usual and proper methods generally employed in the bottling industry." (Italics supplied.)

Although expressly discarding the doctrines of res ipsa loquitur and exclusive control as inapplicable under the circumstance in *Loch v. Confair,* the court, by shifting the burden to the defendant to produce evidence of his exercise of due care, placed him in the same position as if the doctrine of exclusive control had been applied.

It is to be noted that this case was instituted prior to the effective date of the new Pennsylvania Rules of Civil Procedure on depositions and general discovery (Pa. R.C.P., Rules 4001 et seq.). Query, whether the decision would have been the same if discovery proceedings had been available at the pleading stage. If the defendant's testimony upon the plaintiff's petition under the discovery rules would have developed specific negligence, then the plaintiff could have alleged specific negligence in his complaint and he would have been in a position to prove

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* Associate Judge, 38th Judicial District; LL.B. University of Pennsylvania Law School, 1923.

1 Loch v. Confair, 372 Pa. 212 (1953); Rennekamp v. Blair, 375 Pa. 620 (1954).

such negligence at the trial. On the other hand, if plaintiff had been unable to develop negligence in such manner then it would appear that the shifting to the defendant of the burden of going ahead with the evidence would be equally unavailing.

In *Rennekamp v. Blair,* 375 Pa. 621 (1954), at first blush the facts of the case seem to be susceptible to the application of the doctrine of exclusive control. However, it was not mentioned. The action was brought to recover damages occasioned by the death of a guest, non-paying passenger in a private plane. The cause of the crash was not determined. It might be suggested that the reason that the court did not invoke this doctrine was that death was caused by an airplane rather than by an automobile. However, this contention is weakened by the provision of the Act of May 20, 1933, P.L. 1001, Sec. 406, 2 P.S. 1472, providing that the liability of an owner or pilot of an aircraft for injury or death to passengers carried is to be determined according to the law applicable to torts on lands or water of this Commonwealth arising out of similar relationships. Query, if the vehicle had been a car out of control and the same relationship pertained, would the judgment n.o.v. for the defendant have been sustained? Under similar circumstances, in *Murphy v. Neely,* 319 Pa. 437 (1935), the same result was reached and likewise without reference to the doctrine of exclusive control.

For proper consideration of the subject, it is important at the outset to refer to some elementary principles of the law of negligence. The mere happening of an accident is not evidence of negligence.[2] Furthermore, the plaintiff must clearly prove specific negligence before he can recover. It is not necessary, however, that the evidence of negligence be direct. It may be circumstantial.[3] In *Dillon v. Scull,* 164 Pa. Sup. 365 (1949), the court said, page 370:

> "The proof of negligence by circumstantial evidence has been applied in a wide variety of cases."

Circumstantial evidence of negligence may be classified under two headings:

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2 In Spees v. Boggs, 198 Pa. 112, 116 (1901), plaintiff employee was injured in the fall of an elevator operated by a fellow servant. The trial judge imposed on employer the burden of explaining the cause of the accident or else suffering the imputation of negligence. That was held to be erroneous. "The gist of the action was negligence, and the plaintiff in order to recover was required to prove it. The mere happening of the accident did not raise a presumption that the machinery was unsafe or defective."

"The mere happening of an accident, in the absence of evidence as to the manner of its occurrence, is not sufficient to support an inference that one party and not the other was at fault." Brooks v. Morgan, 331 Pa. 235, 239 (1938); Hulmes v. Keel, 335 Pa. 117, 119 (1939), minor pedestrian was struck in street but plaintiff failed to establish the manner in which the accident happened; Rennekamp v. Blair, 375 Pa. 620, 625 (1954).

3 Actions against common carriers: " 'Negligence need not be proved by direct evidence but may be inferred from attendant circumstances if the facts and circumstances are sufficient to reasonably and legitimately impute negligence. . . .' A jury is not permitted, however, to speculate or guess; conjecture, guess or suspicion do not amount to proof. . . ." Lanni v. Pa. Railroad Co., 371 Pa. 106, 110 (1952); Actions involving motor vehicle accidents: In a case where a pedestrian was struck by a truck turning left in an intersection, the supreme court denied recovery. Stanalonis v. Branch Motor Exp. Co., 358 Pa. 426, 428, 429 (1948); Skrukski v. Cochran, 341 Pa. 289, 291 (1941); Balducci v. Cutler, 354 Pa. 436, 439 (1946); Stauffer v. Railway Exp. Agency, 355 Pa. 24 (1946); Moore v. Esso Standard Oil Co., 364 Pa. 343, 346 (1950).

(1) Those in which the jury may infer from the evidence that in a certain *definite particular* the defendant has been derelict in his duty.

(2) Those in which a presumption arises or the jury may infer from the evidence that the defendant has been derelict even though the proof does not indicate a certain *definite particular* in which he has been negligent.

It is to the latter category that the doctrines of res ipsa loquitur and exclusive control properly belong. We shall see that the doctrine of res ipsa loquitur is only applied where the claim is by a patron, quasi-patron, business guest or customer against a common carrier, quasi-common carrier or other public utility, whereas it is not necessary to have such relationship for the application of the doctrine of exclusive control. It will be noted that there must be a contractual relationship between the parties before res ipsa loquitur can be used which is not so in the case of exclusive control.

Prerequisites To The Application Of The Doctrine Of Res Ipsa Loquitur

The maxim of res ipsa loquitur applies only where the following are shown:

(1) Accidental injury to the patron, quasi-patron or customer of a common carrier, quasi-common carrier or public utility. The early cases were to the effect that upon a showing of this alone, the burden of proving absence of fault devolved upon the common carrier or other public utility.[4] In its inception, the doctrine applied only where actual contractual relations existed. Later it was expanded to include any one who operates a conveyance which he reasonably expects the general public to use as his business guest. Thus actual contractual relations need not always exist.[5]

(2) By later decisions, the plaintiff has been required to prove not only the mere happening of an accident, but causation by a defect in the defendant's real or personal property or by a want of diligence or care in those employed by the defendant or by any other thing which the defendant can and ought to control as a part of its duty to furnish the service contracted for.[6] The rule is illustrated in numerous cases. Limitations of space permit citation of but a few.[7]

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4 "Nay, the mere happening of an injurious accident, raises, prima facie, a presumption of neglect, and throws upon the carrier the onus of showing it did not exist." Laing v. Colder, 8 Pa. 479, 483 (1848); 49 Am. Dec. 533.

5 Petrie v. Kaufmann & Baer Co., 291 Pa. 211, 213 (1927), where plaintiff was injured by jerking of escalator. Referring to escalators and elevators, the court said, "The passenger is at least as powerless to influence the action of the former as the latter. Hence, the rule that an elevator is deemed a common carrier applies equally to an escalator." See also Fox v. Phila., 208 Pa. 127 (1904). See also McKnight v. S. S. Kresge Co., 285 Pa. 489 at 494 (1926), giving reasons for highest degree of care.

6 Meier v. Pa. Railroad Co., 64 Pa. 225, 230 (1870).

7 Palmer v. Warren St. Ry. Co. 206 Pa. 574, 579 (1903), collision of cars; Fern v. Pa. Railroad Co., 250 Pa. 487, 491 (1915), displacement or disarrangement of car platform; Bickley v. P. & R. Ry., 257 Pa. 369, 375, plaintiff boarding railroad car was struck by defendant's employee, working on ceiling of car; Shaugnessy v. Director General, 274 Pa. 413, 414 (1922), broken rail; Green v. Pittsburgh St. Ry. Co., 219 Pa. 241, 244 (1908): "Several possible explanations quite consistent with the evidence coud be advanced, which it lacking equal probability would be none the less reasonable, some of them suggesting causes wholly independent of defendant's alleged negligence." Doud v. Hines, Dir. Gen., 269 Pa. 182, 185 (1921): "In this case the burden was on plaintiff to prove the cause of the injury and the circumstances attending it so as to connect

(3) More recently, it has been said that the cause of the accident must be under the exclusive control of the defendant. *Norris v. Phila. Elec. Co.,* 334 Pa. 161, 163 (1939). However, presumptions may arise even though instrumentalities not entirely under the control or management of the utilities have been involved in an accident.[8] But, where there is an instrumentality over which plaintiff had complete dominion intervening between the alleged cause and the injury, plaintiff must show by evidence that there was no defect in his appliance or operation before the doctrine will be held applicable. *Norris v. Phila. Elec. Co., supra* page 164.

(4) In the ordinary course of experience no such result follows as that complained of, if those in control use proper care.

(5) The damage may not with equal fairness to attributable to any other cause.[9]

(6) Sometimes listed as a prerequisite to its applicability, is that the evidence of the cause of the accident is accessible to the defendant and not accessible to the plaintiff. *Norris v. Phila. Elec. Co., supra,* page 163.

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the accident and injury." Conway v. Phila. Gas W. Co., 336 Pa. 11 (1939), explosion of gas heater not installed by defendant, where plaintiff failed to establish that there was leakage of gas from the heater; For later case slightly rephrasing rule stated in Conway case, see Nebel v. Burrelli, 352 Pa. 70, 74-75 (1945); DuPont v. Pa. Railroad Co., 337 Pa. 89 (1940), passenger in train injured by sudden shattering of glass window; Ambrose v. Western Md. Ry. Co., 368 Pa. 1, 11 (1951), doctrines of res ipsa loquitur and exclusive control held inapplicable where employee of consignee was opening door of railway car of another company than defendant railroad, injury resulting from falling of the door; Delaney v. Buffalo R. & P. Ry. Co., 266 Pa. 122 (1920), plaintiff was resuming her seat in a train when a sudden lurch caused her to fall; Fleming v. Pittsburgh &c. Ry., 158 Pa. 130, 135 (1893), stone started rolling outside railroad right of way; Burns v. Penna. R. R. Co., 294 Pa. 277, 279 (1928), plaintiff while about to board a train was struck by a dog jumping from the platform of a coach. "The evidence shows only momentary presence of a dog upon the platform. . . ."; Zaltouski v. Scranton Ry. Co., 310 Pa. 531, 534 (1933): "The mere happening of the collision between defendant's street car and a truck not under its control or management. . .did not give rise to a presumption or even an inference of negligence on the part of the carrier." (citing other cases); Miller v. Penna. R. R. Co., 368 Pa. 507, 511 (1951); Nebel v. Burrelli, 352 Pa. 70, 71 (1945), and cases cited therein, collision between train and truck at grade crossing.

8 Thus, in Alexander v. Nanticoke, 209 Pa. 571 (1904), plaintiff was severely shocked while handling a light bulb suspended from a flexible extension cord. It appeared, however, that the wires at the time were charged with a higher voltage than they should have carried. Page 579: "The presumption that the (electric company) appellee was negligent is not conclusive. The accident may have been due to causes over which it had no control, and, if so, not being an insurer, it is not liable. But the presumption is that it was blamable, and it can escape liability for appellant's serious injury only by persuading a jury that it had performed its duties as we have here defined them." Similarly in Lynch v. Meyersdale, 268 Pa. 337, 342 (1920), where plaintiff, while using an electric light attached to a cord, received a shock and died, the court affirmed judgment for the plaintiff, saying: ". . .plaintiff assumed the burden of proving her case. . .showing, as far as humanly possible, specific negligence by defendant; although she might have waited to do this in rebuttal, after defendant had produced evidence, which it did, to prove that proper investigation disclosed no negligence on its part. . . ."

9 In Fonzone v. Lehigh Valley Trans. Co., 318 Pa. 514 (1935), the body of plaintiff's decedent was lying across the defendant's tracks when it was struck by a street car. Judgment n.o.v., for defendant was affirmed. Court cited Cain v. Booth, 294 Pa. 334 and Erbe v. P.R.T. Co., 256 Pa. 567, 570, in the latter of which it was said, "The burden was on plaintiff to show that defendant's negligent act was the sole and proximate cause of the death of his wife, to the exclusion of other causes. To show a state of facts from which it appears the injury may have been due to one or more causes is not sufficient." Scharble v. Kuehnle-Wilson, Inc., 359 Pa. 494 (1948); Stauffer v. Railway Express Agency, Inc., 355 Pa. 24, 29; Fisher v. Sheppard, 366 Pa. 347, 351 (1951); McElwain v. Myers, 367 Pa. 346, 349 (1951). Ebersole v. Beistline, 368 Pa. 12, 16, 17 (1951), cites numerous authorities for the above propositions.

The comparative accessibility of evidence may be more of a reason for the rule rather than a prerequisite. Other reasons and justifications for the original establishment of the rule have been found in the following circumstances, viz: that the defendant operated under a monopoly granted by the state; that it possessed the right of eminent domain which was given to it by the state; that there was a contractual relationship or a relationship closely akin thereto resulting in a duty, practically amounting to that of an insurer to perform its monopolistic and contractual services to the patron in such a way that he was not injured by the defendant.

Manner Of The Application Of The Doctrine Of Res Ipsa Loquitur

We have immediately hitherto discussed the prerequisites of the application of the doctrine of res ipsa loquitur. Now we go on to the effect of its use. Upon its application a presumption of negligence arises. It is rebuttable, which leads to the natural inquiry, how may it be rebutted? Since the defendant, subject to the doctrine of res ipsa loquitur, has a heavy duty of care, it has been a seemingly logical and easy step to impose on him the burden of producing a preponderance of evidence of the exercise of the highest degree of practicable care and diligence.[10]

When defendant does produce evidence of a "convincing character", the presumption having served its purpose passes from the picture, but the jury still may consider the evidence giving rise to the presumption along with the other evidence in the total mass of probative matter.[11]

Wigmore on Evidence, 3d ed., vol. 9, § 2485, page 273, speaks of "instances in which the burden of proof (in the sense of a risk of non-persuasion) may be taken from the pleader desiring action and placed upon the opponent. The characteristic, then, of this burden of proof (in the sense of a risk of non-persuasion) in legal controversies is that the law divides the process into stages and apportions

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10 Shaughnessy v. Director General, 274 Pa. 413, 414 (1922), states that once the presumption arises it then becomes "the duty of defendant to establish, by the preponderance of the evidence, that the accident occurred notwithstanding its exercise of the highest degree of practicable care and dilgience. Doud v. Hines, Dir Gen., 269 Pa. 182." Petrie v. Kaufmann & Baer Co., 291 Pa. 211, 214 (1927), says that the "burden is on the carrier to show it (the injury) could not have been prevented by human foresight." MacDonald v. Pa. R. Co., 348 Pa. 558, 560 states that "the burden of either coming forward with defensive evidence of a *convincing character* (italics supplied) or suffering an adverse verdict then shifted to the defendant."

11 District of Columbia's Appeal, 343 Pa. 65, 75 (1941). "However the presumption itself is not evidence. . . .When the presumption relied upon had been rebutted by sufficient evidence, the presumption passed from the picture, though the facts or actual evidence from which the presumption arose remained, free from any artificial effect, to be considered along with the other evidence. 'The important thing is that there is now no longer in force any ruling of law by the judge requiring the jury to find according to the presumption. "All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. . .The main point to observe is that the rule of presumption has vanished." (Thayer's Preliminary Treatise on Evidence, 346); because its function was as a legal rule to settle the matter only provisionally, and to cast upon the opponent the duty of producing evidence, and this duty and this legal rule he has satisfied': Wigmore on Evidence (2d Ed.), See 2487." The presumption "gives way the moment proof to the contrary is presented". Heath v. Klosterman, 343 Pa. 501, 504 (1941).

definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal. It is this apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of non-persuasion." Wigmore, *op. cit.* § 2485, page 274.[12]

Circumstantial evidence may raise a presumption, as where the doctrine of res ipsa loquitur has been applied, or merely a permissible inference of negligence, as where the principles of exclusive control has been applied.

> "A presumption. . .is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent. It is based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact; but the presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it. . . .So long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term 'presumption' to such facts, however great their probative significance. . . .There is in truth but one kind of presumption; and the term 'presumption of fact' should be discarded as useless and confusing. Nevertheless, it must be kept in mind that the peculiar effect of a presumption 'of law' (that is the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent." Wigmore on Evidence, 2d Ed., Vol. 5, § 2491, quoted in *Watkins v. Prudential Insurance Co.*, 315 Pa. 497, 501 (1934).

If the doctrine of res ipsa loquitur has been properly invoked, although the defendant offers uncontradicted evidence of due care, it does not follow that the defendant is entitled to binding instructions or judgment n.o.v. It still remains for the jury to decide whether the explanation satisfactorily exculpates the defendant from the presumption of negligence.[13] If the jury capriciously disregards defendant's evidence, the judicial remedy is the setting aside of the verdict and the granting of a new trial, not the entry of judgment for the defendant n.o.v. *MacDonald v. P.R.R. Co.*, 348 Pa. 558, 567 (1944).

Prerequisites To The Application Of The Doctrine Of Exclusive Control

One distinction between the two doctrines has been pointed out heretofore, namely, that the maxim of res ipsa loquitur applies only where the defendant is a public utility or quasi-public utility and there is a contractual relationship between the parties, while in the other category no such relationship exists. However, only under certain circumstances, which will now be outlined, will the doctrine of exclusive control be applied.

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12 "Presumptions are not evidence and should not be substituted for evidence. No presumption can be evidence; it is a rule about the duty of producing evidence. Presumptions are not fact suppliers; they are guideposts indicating whence proof must come." Smith v. Kingsley 331 Pa. 10, 15 (1938).

13 Doud v. Hines, Dir. Gen., 269 Pa. 182, 185-6 (1921).

The decisions indicate that, subject to certain qualifications, a jury may be permitted to draw an *inference* of negligence where the defendant is in exclusive control of the instrumentality causing the injury. This doctrine was set forth as early as 1865, in the English case of *Scott v. London & St. Katherine Docks Co.*, 3 H. & C. 596, and was restated in Sherman and Redfield on Negligence, § 59 and 60 and in this Commonwealth in *Shafer v. Lacock, Hawthorn & Co.*, 168 Pa. 497, 504 (1895), in the following words:

> "When the thing which causes the injury is shown to be under the management of the defendants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

The exclusive control doctrine has been set forth by the Supreme Court of Pennsylvania as follows:

> "The ordinary application of the maxim (res ipsa loquitur) is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute and show, not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows as that complained of. . . .
>
> If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn." *Oil Co. v. Torpedo Co.*, 190 Pa. 350, 353 (1899).

Subsequent cases in Pennsylvania follow generally the rule set forth in the *Torpedo Co.* case:

> (1) *Defendant must be in exclusive control of the circumstances or appliance which caused the injury.*[14]
>
> (2) *The circumstances must be so free from dispute that causation of injury by the accident may reasonably be inferred.*[15]
>
> "The burden in such cases is always on the plaintiff to show the causal connection between the accident and the negligence alleged. This

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14 Fitzpatrick v. Penfield, 267 Pa. 564, 577 (1920). Dillon v. Wm. S. Scull Co., 164 Pa. Sup. 365, 370. In a case where plaintiff was injured in a theater by the fall of an object from the ceiling, recovery was allowed on the basis that defendant had control. Skeen v. Stanley Co. of America, 362 Pa. 174 (1949). This was actual control as well as legal possession. An entirely different case was presented in Rozumailski v. Phila. Coca-Cola Bottling Co., 296 Pa. 114, 118 (1929). There the plaintiff was injured by swallowing broken glass in a coca-cola bottle. The court held that "the manufacturer was for all purposes in exclusive control of the bottle and its contents, as its contents were undisturbed until it reached the consumer's hands." A similar conclusion was reached in Dillon v. William S. Scull Co., 164 Pa. Sup. 365, 368 (1949), where defendant processor was held liable for injuries to retail patron from bursting of a glass coffee jar. Actually, liability was held possible irrespective of possession and control, as those words have been understood hitherto.

15 Rockey v. Ernest, 367 Pa. 538, 541 (1951): "While negligence need not be proved by direct evidence but may be inferred from circumstantial evidence, i.e., facts and circumstances from which defendant's negligence may be legitimately inferred, nevertheless it is still necessary even in this class of case that the injured person prove that the defendant was negligent and that his negligence was the proximate cause of the accident: Pope v. Reading Co., 304 Pa. 326."

may be done by showing facts and circumstances from which the connection may be inferred by process of rational deduction, but never by speculation." *Trout v. Waynesburg, Greencastle & Mercersburg Turnpike Co.*, 216 Pa. 119, 124 (1906).

Fitzpatrick v. Penfield, 267 Pa. 564 (1920), states at page 577:

"In other words, the failure to provide proper care being the negligent act, when the accident occurs it can only come through one channel, that is the negligent act."

(3) *The doctrine applies only if in the ordinary course of experience no such result follows as that complained of, if those in control use proper care. Dillon v. William S. Scull Co., supra.*[16]

(4) *The evidence must preclude the possibility of injury in any way other than by the negligence of the defendant.*[17]

(5 & 6) In addition, one decision states that, "Great care must be exercised to limit this so-called Rule or exception to cases which are *exceptional, and where the evidence of the cause of the accident is not equally available to both parties but is peculiarly or exclusively accessible to and within the possession of the defendant.*" That this is not only a prerequisite but that it is the fundamental basis for the doctrine is indicated in a recent case.[18]

The principle is applied frequently, though by no means exclusively in automobile cases. See list of some examples in footnote in *Dillon v. Scull*, 164 Pa. Sup. 365, 370.

The Manner Of The Application Of The Doctrine Of Exclusive Control

In the event that the doctrine of exclusive control applies, (and it appears to be a question for the jury as to whether the preliminary facts exist so that the doctrine may apply) the accurate statement of the law is not that negligence *is presumed* but that there is circumstantial evidence from which it *may be inferred* by the jury. *Oil Co. v. Torpedo Co., supra*, page 353.

It should be noted that it is within the prerogative of the jury as to whether negligence will or will not *be inferred*. There is no *presumption* against the defendant. However, the burden does devolve upon the defendant to prove that the accident did not occur from his want of care. *Knox v. Simmerman*, 301 Pa.

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16 Maltz v. Carter, 311 Pa. 550, 553 (1933). Plaintiff was a passenger in an automobile driven on a clear night over dry straight road, 16 feet wide in good condition at speed of 30 miles per hour with no other traffic. Without warning the car swerved and left the road on the right side and struck a tree 7 feet from the edge of the road. Judgment on verdict for plaintiff was affirmed. "That the coupe did this very extraordinary thing is some evidence that it was not properly driven." So also in Knox v. Simmerman, 301 Pa. 1 (1930), where defendant's automobile failed to make a turn, dashed into a pile of stone and turned over nearly twice.

17 The doctrine, dangerous and uncertain at best, is never to be applied except where it not only supports the conclusion contended for, but also reasonably excludes every other. Allen v. Kingston Coal Co., 212 Pa. 54 (1905); Stanalonis v. Branch Motor Exp. Co., 358 Pa. 426, 428-9 (1948) citing Donaldson v. Pittsburgh Ry. Co., 358 Pa. 33, 37 and Stauffer v. Railway Express Agency, Inc., 355 Pa. 24, 29. The Allen case was suit against employer for wrongful death of employee found dead at a mine door, the theory being that he had been caught between the side of the passageway and the side of a moving car, and squeezed to death. The court evidently used the expression res ipsa loquitur as interchangeable with the doctrine of exclusive control.

18 Rockey v. Ernest, 367 Pa. 538, 542 (1951).

1 (1930). Defendant need not show the cause of the accident[19] but only the exercise of the due care of a reasonable man, under the circumstances, to prevent harm.[20]

Whether or not defendant has sustained his burden of showing exercise of due care is within the province of the jury to decide.[21]

There is some doubt as to the quantum of evidence necessary in order that the jury may be permitted to infer negligence. A line of cases states that "very slight evidence is sufficient to meet the burden of proof."[22] The correct rule would seem to be that circumstantial evidence must always be submitted to the jury unless it is so inconclusive that as a matter of law no probability can be determined. *Trostel v. Reading Steel Corp.*, 152 Pa. Sup. 273 (1943). This case quotes *Brown v. Schock*, 77 Pa. 471, 479 (1875), as explaining the circumstantial evidence rule very clearly and simply:

> "In a question of circumstantial evidence, the *proof* derived from the circumstances is a question of natural presumption, and is to be found by the jury. The strength of this proof depends on the probability resulting from the facts. The presumption thus arising, being a natural one, is to be determined necessarily *by the jury,* and not *by the court.* It is the right of the party to have this submitted to te jury, unless it be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances." (Italics supplied).

The Trostel case continued, pages 277 and 278:

> "The more recent cases have added to the rule that after these requirements are met the burden is then upon the defendants of establishing their freedom from fault. Knox v. Simmerman, 301 Pa. 1 . . . . It is not necessary that the proof exclude all other possible causes of the accident, but only those which fairly arise from the evidence. The test of the sufficiency of the evidence is whether the circumstances detailed are such as to satisfy reasonable and well balanced minds that the accident resulted from the negligence of the defendant."

And at page 279:

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19 Dillon v. Wm. S. Scull Co., 164 Pa. Sup. 356, 369 (1949), citing Durning v. Hyman, 286 Pa. 376.

20 See Skeen v. Stanley Co. of America, 362 Pa. 174, 177 (1949); defendant was required to "show that it exercised due care to prevent harm to its patrons".

21 Miller v. Meadville Food Service, Inc., 173 Pa. Sup. 357, 362 (1953), states that the doctrine "shifts the burden of exculpating itself to defendant. . . .It was within the province of the jury to decide whether defendant's explanation of due care exculpated it from the charge of negligence."

22 Murray v. Frick, 277 Pa. 190, 193 (1923), where plantiff was injured by fall of a window screen from a building; Dei v. Stratigos, 287 Pa. 475, 477 (1926), injury from fall of a 100 foot smoke stack which was being erected; Fitzsimmons v. P.R.T. Co. 56 Pa. Sup. 365, 369 (1914), pedestrian injured by fall of trolley wire; ". . .the quantum of proof necessary to establish negligence under certain circumstances need be very light." Persing v. Citizens Traction Co., 294 Pa. 230, 234 (1928), trolley out of control injured independent contractor; Lesick v. Proctor, 300 Pa. 347, 350 (1930), electric burns suffered by customer receiving permanent wave in beauty shop.

> ". . .There is a class of cases in. . .which accidents are alleged by circumstances from which the inferences of negligence is legitimate. In such cases *negligence is not a presumption of law* but a *finding of fact by the jury* from the surrounding circumstances and conditions and the inferences reasonably deductible therefrom." (Italics supplied)

It would be too much to hope that any article, however weighted with authorities, would answer all questions which might arise in this vast and troublesome field, but we do hope that the sources referred to may be helpful.